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NO. 401

In the Supreme Court of the United States

LEWIS C. DOUGALL,

Petitioner,

v.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LEWIS C. DOUGALL, pro se,
ROGER TILBURY,
606 Executive Building,
Portland, Oregon,
Of Counsel for Petitioner.

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Petitioner prays that Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered June 13, 1958 by a two to one majority, affirming the United States District Court for the District of Oregon.

OPINIONS BELOW

Memorandum opinions of the District Court are not reported.

First opinion of the Court of Appeals is reported in 207 F 2d 843. The second opinion is not yet reported.

JURISDICTION

Jurisdiction of the Court is invoked under Title 28 Sec 1254, USC.

QUESTION PRESENTED

Where the Court segregated and tried one of two distinct and unrelated issues at the request of one party, but through inadvertence entered judgment dismissing the entire case without trying the reserved issue, does the Court have power to set aside the erroneous judgment and try the reserved issue?

For brevity we will refer to Lewis C. Dougall as petitioner, to Spokane, Portland and Seattle Railway Company as respondent, to Morrison-Knudson Co., Inc. as contractor, to the Federal Employers' Liability Act as FELA, and to the Federal Safety Appliance Act as SAA.

STATEMENT OF FACTS

Prior to January 30th, 1946, the date appellant was injured, the main line of respondent between Portland and Spokane was in need of repair. Respondent employed Morrison-Knudson Company, Inc., to clean its ditches, and to restore, recut and widen its banks (Ex. 14) (In. Tr. 5).

Petitioner was a member of the construction crew engaged in this work near Goodnoe, Washington and while so employed received severe injuries including the amputation of his left leg above the knee, four toes from his right foot, and many other injuries requiring extended hospitalization (In. Tr. 5-6)

The contractor used a motor truck and flat car, each with four wheels and flanges, to permit it to be operated on respondent's tracks. On the flat car was a standard ditcher, drag line, boom, cabledrum and other equipment. Power for pulling the flat car was supplied by the motor truck. The parties are agreed that neither truck nor car was equipped with any of the following safety appliances which are absolute requirements of the Safety Appliance Act: driving wheel brakes, train bra. system, automatic couplers, secure crab irons, hand holes on the ends of sides of the car, or sill steps (In. Tr. 6).

Petitioner's injuries occurred when he attempted to climb onto the flat car to convey instructions of the contractor's foreman to the operator of the drag line. Suddenly, without warning, the operator of the motor truck moved the truck and car with a sudden bump and jerk, throwing petitioner off the flat car onto the track. The coupling between the truck and flat car was not an automatic coupler, but a loose coupling which caused more slack than automatic couplers. There were no grab irons, hand holes, or sill steps.

The equipment was owned by contractor and though not equipped with safety appliances its use was permitted on the main line of respondent even though the entire crew was controlled in certain respects by a conductor and two brakemen of respondent (Ex. 13, pp. 25-27). The work was also supervised by respondent whose officials frequently visited the place where the repairs were being made and from time to time directed the crew where to load and unload the dirt (In. Tr. 79, Ex. 13, p. 31).

The original complaint was filed January 25, 1949 charging a violation of both Safety Appliance Act and Federal Employers' Liability Act (In. Tr. 33).

This case has been continuously predicated upon two basis FELA and SAA. Respondent asked that the FELA be segregated for its own convenience over petitioner's objection (In. Tr. 12). The Court granted this request and decided Dougall could not recover because he was not an employee within FELA. However instead of immediately trying the segregated issue the Court dismissed the entire case over petitioner's objections. Petitioner has continuously asked for a trial of this issue. This is seen by the following:

1. The original complaint was filed setting forth a cause of action under both FELA and SAA (2nd Tr. 1). The initial complaint sets forth violations of the SAA in five respects.

2. In the pre-trial order tendered by plaintiff's counsel six separate violations of the SAA are enumerated and it appears six times under issues of fact and six times under issues of law (2nd Tr. 31-40).

3. In the pre-trial order prepared by respondent and signed by Judge McCulloch on May 20, 1952 it is stated as follows:

> "Segregation of Issues.
>
> "Plaintiff's Contention: A. Plaintiff contends that all issues should be tried together and there should be no segregation issues for trial.
>
> "Defendant's Contention: B. Defendant contends that in order to avoid the expense and inconvenience of calling witnesses on all issues, some

of which may be rendered moot by reason of the Court's disposition of the legal issues, the Court should segregate for separate trial issue I A."

Issue I A was limited to the violation of the FELA. Issue I B, which was reserved, related to violations of the SAA, as well as certain phases of the FELA.

4. Judge McCulloch granted the request of appellee that the FELA be segregated for separate trial and at the hearing held the same day as the pre-trial order was signed the only evidence received related to violations of the FELA (In. Tr. 17, 18, 23, 24). Only one witness was called upon to testify and he was Edward Stanton, Vice-President of the defendant railway and his testimony was limited exclusively to the question of the application of the FELA to this set of facts. At that hearing one of the initial statements made by a counsel for appellant was:

> "Now, as I understand the case, your Honor, we are here to present to your Honor the first legal proposition which goes to the point as to whether or not the plaintiff here can maintain this action under the FELA, Sections 51 as amended by . . ."

5. In petitioner's trial brief offered at this hearing it was specifically stated that he was discussing only the "First legal proposition to be determined" This issue was the FELA.

6. Judge McCulloch in announcing his decision four days after this hearing stated that he was unable to distinguish this case from the case of Norman v. SP&S Railway which had been decided a short time before by another judge in the same district. The

Norman case was brought strictly under FELA and did not involve SAA. Norman was injured while repairing a bridge on the SP&S and while employed by an independent contractor. Part of the scaffolding gave way and he fell to the ground. There was no contention that SAA was violated (In. Tr. 16).

7. The findings of fact prepared by respondent and signed by the Court July 11, 1952 noted that the FELA had been "segregated for spearate trial" and that the parties had "rested on this issue" and that the Court had considered all matters under the provisions "of the FELA." (In. Tr. 17-18).

In the same findings of fact however, Judge McCulloch made the statement that the parties "had stipulated that this action is brought solely under FELA." (In. Tr. 23-24). From this respondent argues that plaintiff intentionally abandoned whatever rights he might have under SAA. The same findings recited that the two issues had been merely segregated. And in order to make his position crystal clear, petitioner filed formal objections the day before the findings were signed to the conclusion that the case came within the exclusive provisions of the FELA (In. Tr. 26).

8. In his initial brief in the Court of Appeals petitioner's counsel again stated "appellant's rights are determined in accordance with the provisions of FELA and the Federal Safety Appliance Act." (In. Tr. 58). He also called the Court's attention to admitted violations of the SAA on 26 occasions in his brief (In. Tr. 3, 4, 8, 45, 46, 47, 48, 50, 57, 58, 62, 63).

9. In a brief filed by respondent's counsel in the District Court recently it was conceded that the issue of the FELA was "segregated for separate trial and there was no occasion for the Court to consider the alleged violations of the SAA." (Defendant's reply memo Civil No. 8635 page 2.)

10. District Judge East also in connection with case No. 8635 (which was an independant action asking that the same issue be tried) also commented that "any theory of action the plaintiff might have had as a non-employee of the defendant was not adjudicated in said cause but, on the contrary reserved * * * ". (Memo November 1, 1956). He then suggested that the proper procedure was to reopen this case.

11. There is also an affidavit in the transcript concerning Watkins who represented petitioner until his death. He insisted he had never entertained the slightest intention of abandoning or waiving whatever rights his client might have had under the SAA (Tr. 28). As a matter of fact he stated this to present counsel at least 200 times.

On the initial appeal to the Court of Appeals the Court affirmed on the grounds that no recovery could be had under FELA since petitioner was not an employee of the railway. However the Court did not pass upon the SAA but noted:

> "There was reserved the issue as to whether the active or permissive use of equipment in violation of the Safety Appliance Act is negligence." 207 F 2d 843, 847.

Certiorari was denied by this Court, although apparently two judges wished to grant it 347 U.S. 904. Following the entry of mandate petitioner filed a motion in the District Court asking that the segregated untried issue of SAA be tried, but this request was denied by the District Court and this was affirmed by the Court of Appeals, 2-1.

SPECIFICATIONS OF ERROR TO BE URGED

The Court of Appeals erred in failing to set aside a judgment of the District Court which inadvertently dismissed the entire case even though one of the two basis for recovery had been reserved and untried.

REASONS WHY CERTIORARI SHOULD BE GRANTED

1. The Court of Appeals so far sanctioned such a departure from accepted and usual course of judicial proceedings and fair play by the District Court, as to call for an exercise of this Court's powers of supervision.

2. The Court of Appeals has decided an important question of Federal Law with respect to the scope of Rule 60 and the inherent powers of Federal Courts, which has not been, but should be, defined by this Court.

3. The decision is in conflict with the following decisions of this and other Federal Courts, to-wit:

A. U.S. v. Ohio Power Company, 77 S. Ct. 652, 1957.

B. Cahill v. New York, New Haven & Hartford R. Co., 351 U.S. 183, 76 S. Ct. 758, 100 L. Ed. 1075, 1956.

C. Klapprott v. U. S., 335 U.S. 601, 336 U.S. 942, 69 S. Ct. 384 1949.

D. Boudoin v. Lykes Brothers, S. S. Co., 350 U.S. 811, 76 S. Ct. 38, 100 Led 727.

E. Kenyon v. Chain O'Mines, CCA 10, 107 F2nd 160, 1939.

F. U.S. v. Karahaleas, CA 2, 205 F2d 331, 1953.

JURISDICTION OF THE LOWER COURT

Jurisdiction of the District Court was invoked under Federal Safety Appliance Act and FELA.

45 U.S.C. Sections 1-46; 45 U.S.C. Sections 51-55 (Tr. 3).

RULE INVOLVED

Rule 60, Federal Rules of Civil Procedure provides:

"(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the Court at any time of its own initiative or on the motion of any party and after such notice, if any, as the Court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate Court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the Court may relieve a party of his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been dis-

covered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 29, 1948."

ARGUMENT

This is the clearest case of injustice. The original complaint was filed on two separate and distinct grounds, FELA and SAA.

Respondent, however, wished to avoid the expense and inconvenience of calling witnesses on all issues at that time (In. Tr. 13) and requested the Court to segregate for separate trial the violation of FELA. This the

Court did. At no time did petitioner waive the separate violation of SAA and indeed insisted that "all issues should be tried together and there should be no segregation of issues for trial." (In. Tr. 12).

In the dissenting opinion of Circuit Judge Pope, one of the two judges who heard both appeals, it is stated:

"Plainly this judge understood there were two claims, else why segregate one?

"The orderly thing would have been to decide that issue first as it was segregated, and later get around to consideration of the Safety Appliance issues. Apparently through oversight the conclusions and the judgment directed that the *action* be dismissed. If, as I think, it was fairly a two-claim action, the judgment should have been limited to dismissal of one claim only. Then Rule 54 (b) would have come into action.

"However, the judgment dismissed the action in its entirety. So framed it was appealable. Appellant specified as error: 'The U.S. District Court erred in entering its judgment order, to-wit: ADJUDGED that plaintiff take nothing by reason of this action, that this action be and the same is hereby dismissed.' And the point that there was involved a clear claim under the Safety Appliance Act, and that it was error to dismiss the action was argued in part IV of appellant's brief, quoting decisions that 'the law is clear that non-employees within the circle of risk are also covered by the Act.' This court understood this point was being made, but mistakenly said: 'Another theory of action he might have had as a non-employee may not be urged, here since it was not advanced in the trial court.' As I have shown, I think it was so advanced, though ineptly, but the ineptness did no harm since the trial court plaintly understood there were two claims for segregation.

"Appellant has both appealed from the denial

by the district court of relief under Rule 60, and has moved here for correction and amendment of our mandate.

"In my view the case within the rule applied in Cahill v. New York, N. H. and H. R. Co., 351 U.S. 183. As there, our original order was erroneous and we should 'recall it in the interest of fairness.'"

Continuously plaintiff has requested that the separate issue of SAA be tried. In the initial appeal to the Court of Appeals appellant's brief referred to a violation of the SAA 26 times (In. Br. 3, 4, 8, 45, 46, 47, 48, 50, 53, 58, 62, 63). Indeed it would have been absurd for plaintiff to abandon a separate and distinct basis for recovery. The SAA violation is evident and conceded. The pre-trial order stipulated that neither truck nor car were equipped with train brake system, automatic couplers, secure grab irons, hand holds, sill steps or train brakes (In. Tr. 6), all undeniable violations of the SAA (45 USC Sec. 1-46). There are innumerable decisions that violation of the SAA gives rise to absolute liability. Unlike FELA, it is unnecessary to prove negligence by the offending railway.

Petitioner failed with respect to FELA because the Court was not satisfied he was an employee of the railway. However, under SAA it is completely immaterial whether he was an employee of the railroad or an independent contractor. Shields v. Atlantic Coast Line R. Co., 350 U.S. 318, 76 S. Ct. 386, 1956.

It would have been absurd for counsel for petitioner to intentionally abandon one of the two basis for recovery. As a matter of fact late counsel for petitioner

assured present counsel at least 200 times that he had never abandoned any rights his client might have under SAA (2nd Tr. 28).

Two Circuit Judges felt that issue of the SAA had been discarded, because in the pre-trial order prepared by respondent, the issues were stated as follows:

"I. Alleged Liability under Federal Employers' Liability Act.

A. Right to Maintain Action under Federal Employers' Liability Act.

B. Alleged Liability for Negligence under Federal Employers' Liability Act and Alleged Violation of Safety Appliance Act.

1. If plaintiff has a right of action under the Federal Employers' Liability Act against defendant herein, is defendant liable under that Act (a) for negligence . . . or (b) in the active or permissive use of equipment in violation of the Safety Appliance Act . . . ?"

It is true, as dissenting Judge Pope states, that late counsel for petitioner was probably inept in signing respondent's trial order which listed SAA as a sub-issue under FELA. Nevertheless he felt he had made his position clear by the balance of the same pre-trial order. Specifically the following:

(a) Paragraph VII states the parties agree the equipment was not provided with six mandatory requirements of SAA (1st Tr. 6).

If this issue was no longer of importance why set it forth in such detail?

(b) It was also stated that plaintiff contended that

defendant was negligent in using equipment not equipped with 6 enumerated requirements of SAA (1st Tr. 9).

(c) As defendant's contention it was stated that the SAA did not apply to this equipment and it was not a cause of this accident (1st Tr. 9).

(d) Even stronger is this (1st Tr. 12).

"Segregation of Issues. Plaintiff's Contention.

"A. Plaintiff contends that all issues should be tried together and there should be no segregation for issues for trial.

"Defendant's Contention: B. Defendant contends that in order to avoid the expense and inconvenience of calling witnesses on all issues, some of which may be rendered moot by reason of the Court's disposition of the legal issues, the Court should segregate for separate trial issues I A."

It was strictly at respondent's request that the two issues were segregated. Respondent in asking for a segregation stated that "some" of the issues may be rendered "moot."

He did not say all issues would be rendered moot but only some would be. The two issues were segregated because respondent's counsel requested it. The confusion stems directly from that fact. Will the Court permit respondent to profit by the confusion which it interjected?

The pre-trial order quoted above was drafted by respondent. In the pre-trial order offered by petitioner it was stated (2d Tr. 30):

"This action is brought under the provisions of

the Federal Employers' Liability Act, Title 45, USCA Ch. 2, Section 51 and following, *and* the provisions of the Federal Safety Appliance Act, Title 45, U.S.C.A., Chapter 1, Section 1, and following:"

6 separate violations of SAA were then enumerated (2d Tr. 31):

"5 issues of fact appear:

(1) Violation of FELA.

(2) Violation of SAA.

(3) Proximate cause under FELA and SAA.

(4) Contributory negligence.

(5) Injuries (2d Tr. 33).

SAA and FELA were also stated as separate, independent, and distinct modes of recovery under proposed issues of law (2d Tr. 37) and contentions (2d Tr. 38).

This proposed pre-trial order was served a few days prior to the signing of the pre-trial order drafted by respondent.

In the initial brief filed with the Court of Appeals petitioner asserted violations of SAA on 26 occasions (1st Tr. 3, 4, 8, 45, 46, 47, 48, 50, 57, 58, 62, 63). As a matter of fact the text of § 1, 2, 4, 9 and 11 of SAA are set forth in haec verba (62). Among other statements in this brief are the following:

(a) "There was no question of the violation of the Safety Appliance Act * * * " (45).

(b) "FELA and Safety Appliance Act were violated * * * " (46).

(c) "Federal Employers' Liability Act and Safe-

ty Appliance Act were both violated and resulted in appellant's injuries" (46).

(d) "A violation of the Federal Safety Appliance Act constitutes negligence per se * * * " (46).

(e) "Notwithstanding the language as to negligence is Sec. 1 of the FELA it is now settled that the duty imposed upon the carrier by the Safety Appliance Act is not based on Negligence, but is an absolute duty * * * " (47).

What possible construction can be placed upon these statements other than a continuous assertion that he was entitled to recover under both SAA and FELA? As a matter of fact this is specifically stated: (Br. 46).

Respondent was also well aware that petitioner was arguing strenuously that SAA had been violated. For example on page 31 of respondent's initial brief in the Court of Appeals it is stated:

"Appellant advances the argument in this Court * * * that, conceding he is not an 'employe' of appellee within the meaning of Section 1 of the FELA (45 U.S.C.A. Section 51); he was within the coverage of the Federal Safety Appliance Acts (45 U.S.C.A. Section 1 et seq.); and, therefore, his action should have not been dismissed.

"Appellant first baldly states that there was no question as to appellee's violation of the Safety Appliance Acts * * * ."

The Court of Appeals noted in its initial opinion that:

"There was reserved the issue as to whether the active or permissive use of equipment in violation of the Safety Appliance Act was an act of negligence." 207 F 2d 843, 847.

Even respondent concedes that FELA was segregated for separate trial and there was no occasion for the Court to consider violations of SAA (2d. Br. 8).

The basic question in this proceeding is whether a separate grounds for recovery under the SAA was abandoned or reserved and segregated. The entire record reveals continuous assertions that there are two grounds for recovery. There was never the slightest intention to discard one. Indeed it would be hard to imagine why venerable counsel such as Mr. Watkins would suddenly do a complete reversal and discard an issue which he had been so careful to inject. His subsequent conduct speaks louder than words. He advanced it in the Court of Appeals, he formally objected in the District Court, he joined with the present counsel in filing an independent action asking that this untried issue be heard, and one of his last acts before his death was to assist present counsel in preparing the motion which is the subject matter of this appeal. If Mr. Watkins was inept in not making the record more forceful then we respectfully urge your Honors to exercise the ample powers with which you are invested to see that substantial justice is accomplished. The important consideration in the long run is how it affects the interest of litigants. If Mr. Watkins did make such a mistake then justice should resolve any doubts in favor of the parties. Neither should not be bound strictly by oversights of their respective attorneys.

Rule 60 invests ample power to rectify this obvious miscarriage. It has been the universal practice to give Rule 60 A a broad and liberal construction.

Klapprott v. U.S., 335 U.S. 601, 336 U.S. 942, 69 S. Ct. 384, 1949;

Professor Moore believes the rule should be liberally construed for the purpose of doing substantial justice, and suggests the following tests:

> "If relief is sought from a default judgment or a judgment of dismissal where there has been no consideration of the merits, whether in a particular case the interest of deciding cases on the merits outweighs the interest in orderly procedure and in the finality of judgment, and whether there is merit in the defense or claim, as the case may be; if relief is sought from a judgment rendered after a trial on the merits, whether movant had a fair opportunity to present his claim or defense; whether there are any intervening equities which makes it inequitable to grant relief; and any other factor that is relevant to the justice of the judgment under attach. * * *." Vol. 7, Sec. 60.19, p. 225.

In this case there are no intervening rights which will be infringed. Petitioner has been denied a hearing with respect to SAA despite 6 admitted SAA violations. Respondent in preparing the judgment was responsible for this oversight and would suffer no conceivable prejudice because the matter has not been presented at an earlier date. All essential facts proving conclusively that a violation of the Safety Appliance Act has occurred were stipulated previously in the pre-trial order. None of those stipulated facts, which are the heart of this case, have been changed or altered in any respect.

This court has the power to correct this obvious oversight. Relief has often been granted in analogous situations.

Greenberg v. Arsenal Bldg. Corp., CCA 2, 144 F2d 292, 1940.
U. S. v. Roth, CCA 2, 164 F2d 575, 1948.
Crosby v. Pacific SS Lines, CCA 9, 133 F2d 470, 1943, cert. den. 319 U.S. 752, 63 S. Ct. 1166.
Woodworkers Tool Works v. Byrne, CA 9, 191 F2d 667, 1951.
Libby, McNeil & Libby v. Alaska Industrial Board, DC Alaska, 109 FS 101, 1952.
Ex Parte Wright, DC Cal., 8 FRD 358, 1948.
Bowles v. Branick, DC MO, 66FS 557, 1946.

These cases are ample proof that a court is not helpless when confronted with an oversight so manifest and so shocking. Professor Moore in his work on Federal Practice, 2nd Ed., Vol 6 in discussing Rule 60A (Lc 4031), states:

"All elements of society—the courts, the profession, litigants, and the public at large—have an interest in the stability of judgments. They also have an interest in seeing that judgments are clerically accurate, effect substantial justice, and do not become instruments of oppression and fraud.

(Lc 4042) "The error envisioned by Rule 60 (a) cover such things as mispirsons, oversights and omissions, unintended acts or failures to act. Rule 60 (a) is a substantial adoption of the principles embodied in Equity Rule 72. In the interest of justice and to the end that the record reflect the actual intention of the court and parties relief from such minor errors should be freely granted."

(Lc 4044) "Where the court errs in its mathematical computations as to the amount due the plaintiff, then relief can be had under the provisions of Rule 60 (a). Similarly, relief can be given from a mistake in the record made by the clerk. Where through the error and confusion of a naturalization applicant, and through the failure of the

> clerk to ascertain the true intention of the applicant as to the name under which he desired to receive his citizenship, the court under Rule 60 (a) may correct the error."

This particular situation was either caused by a clerical error within the meaning of 60 (a) or it was as mistake within the meaning of 60 (b) (6).

Professor Moore, in speaking of Rule 60 (b) (6), states (Federal Practice, 2d Ed., Sec. 60.27, Vol. 7, p. 309):

> Speaking generally, clause (6) is a reservoir of equitable power to do justice in a particular cause for any reason not comprehended in the preceding clause (1)-(5), that justifies relief."

This case is very similar to Kenyon v. Chain O'Mines, CCA 10, 107 Fed. 2d 160, 1939, where the court stated a judgment may be amended to make it conform to findings where by mistake or inadvertence a judgment has been entered in terms differing therefrom.

Even aside from Rule 60 and the provisions dealing with interlocutory orders, it has always been recognized that the court has inherent power to entertain remedial actions for relief against judgments in order to see that substantial justice is accomplished.

> Oliver v. City of Shattuck, CCA 10, 157 F2d 150, 152, 1946;
> Barron & Holtzoff, Federal Procedure, Vol. 3, § 1331, P. 272.

This is also illustrated by Cahill v. New York, New Haven and Hartford R. Co., 351 U.S. 183, 76 S. Ct. 758, 1956. This action was filed under FELA. Judgment was entered in the District Court for plaintiff

for $90,000.00. The Court of Appeals reversed on the ground that evidence was insufficient to support a finding that the railroad had been negligent in failing to provide a safe place to work. The accident occurred on Highway 1 in New Haven, Conn. Upon appeal the U.S. Supreme Court reversed and reinstated the verdict. The court also denied a rehearing. Subsequently the railroad paid $90,000.00 to plaintiff. After plaintiff had spent most of it the railroad asked the Supreme Court to recall its mandate because it had overlooked the possibility that the lower court might have erred in admitting evidence concerning other accidents at this same location. This was granted and the case remanded. If this remedy is available to the railroad it is certainly available to injured employees.

To the same effect is U. S. v. Ohio Power Company, 353 U.S. 98, 77 S. Ct. 652, 1 L. Ed. 683, 1957. This was a tax case involving the right of the War Production Board to certify that only part of the actual cost of wartime facilities, constructed by a taxpayer at the instance of the government, was necessary in the National Defense and hence subject to accelerated amortization under the Internal Revenue Code. Claiming that the WPB had no power to certify less than the full cost, the taxpayer sued in the Court of Claims to recover the alleged overpayments. The Court of Claims sustained this contention on March 1, 1955. The Government petitioned for certiorari. This was denied October 17, 1955. Petition for rehearing was denied December 5, 1955. Finally on June 11, 1956, the Supreme Court sua sponte vacated its order of December 5, 1955, and vacated its order denying certiorari,

and reversed the judgment of the Court of Claims. The Supreme Court felt it should be disposed of consistently with two other cases which it had decided in the interim. The court stated (l.c. 652):

> "We have consistently ruled that the interest in finality of litigation must yield where the interest of justice would make unfair the strict application of our rules. This policy finds expression in the manner in which we have exercised our power over our own judgments, both in civil and criminal cases. Clark v. Manufacturers Trust Co., 337 U.S. 953, 69 S. Ct. 1525, 93 L. Ed. 1754; Goldbaum v. United States, 347 U.S. 1007, 74 S. Ct. 861, 98 L. Ed. 1132; Banks v. United States, 347 U.S. 1007, 74 S. Ct. 861, 98 L. Ed. 1132; McFee v. United States, 347 U.S. 1007, 74 S. Ct. 861, 98 L. Ed. 1132; Remmer v. United States, 348 U.S. 904, 75 S. Ct. 288, 99 L. Ed. 710; State of Florida ex rel Hawkins v. Board of Control, 350 U.S. 413, 76 S. Ct. 464, 100 L. Ed. 486; Boudoin v. Lykes Bros. S.S. Co., 350 U.S. 811, 76 S. Ct. 38, 100 L. Ed. 727; Cahill v. New York, N. H. & H. R. Co., 351 U.S. 183, 76 S. Ct. 758, 100 L. Ed. 1075; Achilli v. United States, 77 S. Ct. 669."

We respectfully urge this court to rectify a situation so patently unjust. This court, and only this court, has the power to bring about substantial justice. An employe has been horribly mangled because of an admitted criminal act on the part of the railway in permitting equipment to be operated on its right of way in direct violation of the SAA. There is no question as to injury (amputation of one leg and four toes on his other foot). There is also little question with respect to liability. Indeed this is virtually stipulated in the pre-trial order which admitted 6 violations of SAA. But he has been denied any relief whatsoever, except for a small preliminary initial allowance from the Washington Work-

men's Compensation Fund. And even these benefits were soon terminated by the commission, which informed him that he should pursue his remedy strictly against the railway, and directed him to repay whatever benefits he had received. He was advised by counsel that he had a clear cut cause of action against the railway. Relying upon this he filed an election to pursue his remedy strictly under the railway acts. His complaint charged a violation of FELA and SAA. At the request of appellee the issue of the violation of the FELA was segregated for separate hearing. The lower court concluded that since he was not a direct employe of the railroad, itself a very difficult question, he could not recover under FELA. However, instead of immediately trying the segregated reserved issue the court entered judgment against him over petitioner's objection, as if the entire case had been heard. The end result was that the court has turned its back on a man who has been made a cripple for life in a case of absolute liability. This cannot and must not be the law! In fairness, Lewis Dougall must be given his day in court.

It is respectfully submitted that the decision below is incorrect and in conflict with the decisions of this Court and several Courts of Appeals and should be corrected, and that this petition for writ of certiorari should therefore be granted.

Respectfully submitted,

LEWIS C. DOUGALL, pro se,
ROGER TILBURY,
Of Counsel for petitioner,
Lewis C. Dougall.

APPENDIX I

Opinion of the District Court

ORDER DENYING PLAINTIFF'S MOTION FOR CORRECTION AND RELIEF FROM JUDGMENT

The plaintiff having moved the court under Rule 60 of the Federal Rules of Civil Procedure for correction of and relief from the judgment heretofore entered on July 11, 1952, and said motion having come on to be heard before the court, Roger G. Tilbury, attorney for plaintiff, appearing in support of the motion, and Cleveland C. Cory, of attorneys for defendant, appearing in opposition thereto, and the court having heard arguments of counsel and having considered the written briefs of counsel filed at the time of argument, and the court having fully considered the entire record in this case and the proceedings in the United States Court of Appeals for the Ninth Circuit herein, and the court being of the opinion that plaintiff's motion should be denied, it is

Ordered that plaintiff's motion for correction and relief from judgment be, and the same hereby is, denied in all respects.

Done and dated this 15th day of January, 1957.

s/ WILLIAM G. EAST,
United States District Judge.

APPENDIX II

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LEWIS C. DOUGALL, *Appellant*,	)	
vs.	)	No. 15,554
SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation, *Appellee*.	)	June 13, 1958

Appeal from the United States District Court for the District of Oregon

BEFORE: HEALY, POPE, and HAMLEY, Circuit Judges

HEALY, Circuit Judge

This is an appeal from an order of the United States District Court for Oregon denying appellant's motion, under Rule 60 of the Federal Rules of Civil Procedure, for correction and relief from a judgment which was entered July 11, 1952.[1]

This judgment dismissed appellant's action under the Federal Employers' Liability Act to recover from appellee damages on account of personal injuries sustained by appellant in January of 1946. The judgment was affirmed on appeal to this court (207 F 2d 843,

[1] Appellant has also filed with this court a motion for correction and amendment of our mandate in the previous appeal of this case, premised on the assertion that we there lacked jurisdiction because there was no final judgment from which to appeal. The motion is denied for reasons hereinafter appearing.

Case No. 13,492), and certiorari was denied (347 U.S. 904). Judgment on this court's mandate was entered below February 23, 1954. The motion under Rule 60, Federal Rules of Civil Procedure, was filed November 21, 1956, and the order presently appealed from was entered in January 1957.

As stated in our opinion on the original appeal, a pre-trial order, approved by counsel for both parties, was entered. By stipulation, the order was to supersede all pleadings. The final pre-trial order set out the issues as follows:

"I. Alleged Liability under Federal Employers' Liability Act

A. Right to Maintain Action under Federal Employers' Liability Act.

B. Alleged Liability for Negligence under Federal Employers' Liability Act and Alleged Violation of Safety Appliance Act.

1. *If plaintiff has a right of action under the Federal Employers' Liability Act against defendant herein,* is defendant liable under that Act (a) for negligence . . . or (b) in the active or permissive use of equipment in violation of the Safety Appliance Act . . ." [Emphasis supplied.]

It is clear that the action to be tried was framed entirely under the Federal Employers' Liability Act. The trial court agreed to separate issues IA and IB. Witnesses were heard as regards the first of these issues, namely IA, "is there a right of action under FELA?" The trial court found the defandant railroad company NOT liable under the Federal Employers' Liability Act, on the ground that Morrison-Knudsen was an inde-

pendent contractor; therefore, plaintiff was not an employee of the defendant railroad company. This being the case, the court did not reach issue IB, but in accord with its findings of fact it entered judgment dismissing the action.[2]

The district court's order denying appellant's motion for relief must be affirmed. For the purpose of the motion, this court will look at the record in No. 13,492 solely for the purpose of determining whether the judgment of July 11, 1952, was a final judgment, or whether, as appellant contends, it was an unappealable interlocutory order. The judgment dismissed and terminated this action in the court below. It was, as already indicated, granted on findings of fact and conclusions of law which determined that appellant was not an employee of appellee and could not maintain an action under the Federal Employers' Liability Act.

The judgment being one of dismissal on the merits of appellant's action for damages under the provisions of the Federal Employers' Liability Act was obviously a final and appealable judgment.

Affirmed.

POPE, C. J.

I dissent. I think the part of the pre-trial Order des-

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[2] The court also suggested from the bench that the plaintiff might desire to amend the pre-trial order or commence a new action on the ground that there was liability independent of the FELA for permitting violations of the Safety Appliance Act. Plaintiff did not take advantage of the suggestion.

ignated under heading "I B., although poorly drawn,[1] did raise the question whether there was liability under the Safety Appliance Act. If there was any ambiguity about it, the Judge understood it to mean what I have indicated, for his findings recite, in the second introductory paragraph, that "the issues of plaintiff's right to maintain this action under the provisions of the Federal Employers' Liability Act was segregated for separate trial by the Court. . . ." Plainly this Judge understood there were two claims, else why segregate one?

The orderly thing would have been to decide that issue first as it was segregated, and later get around to consideration of the Safety Appliance Act issues. Apparently through oversight the conclusions and the judgment directed that the *action* be dismissed. If, as I think, it was fairly a two-claim action, the judgment should have been limited to dismissal of one claim only. Then Rule 54(b) would have come into action.

However, the judgment dismissed the action in its entirety. So framed it was appealable. Appellant specified as error: "The U. S. District Court erred in entering its judgment order, to-wit: 'ADJUDGED that plaintiff

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[1] The paragraph read in full as follows: "1. If plaintiff has a right of action under the Federal Employers' Liability Act against defendant herein, is defendant liable under that Act (a) for negligence in the operation of the facilities used to repair and recondition the roadbed and right of way in question, or (b) in the active or permissive use of equipment in violation of the Safety Appliance Act; and (c) was defendant's alleged conduct a cause, in whole or in part, of plaintiff's damages?"

The trouble arises from the use of the "if" clause with which the statement begins. I think it possible to construe the clause as applying only to (a), and not to (b), particularly in view of the trial court's plain understanding.

take nothing by reason of this action, that this action be and the same is hereby dismissed." And the point that there was involved a clear claim under the Safety Appliance Act, and that it was error to dismiss the action was argued in part IV of appellant's brief, quoting decisions that "the law is clear that non-employees within the circle of risk are also covered by the Act." This court understood this point was being made, but mistakenly said: "Another theory of action he might have had as a non-employee may not be urged here since it was not advanced in the trial court." As I have shown, I think it was so advanced, though ineptly, but the ineptness did no harm since the trial court plainly understood there were two claims for segregation.

Appellant has both appealed from the denial by the district court of relief under Rule 60, and has moved here for correction and amendment of our mandate.

In my view the case comes within the rule applied in Cahill v. New York N.H. and H.R. Co., 351 U.S. 183. As there, our original order was erroneous and we should "recall it in the interest of fairness."

(Endorsed:) Opinion and Dissenting Opinion. Filed June 13, 1958.

Paul P. O'Brien, Clerk.